Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-350

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

vs.

CANADIAN AMERICAN OIL COMPANY, and FREDERICK M. TAUTENHAHN, Partners dba FREDERICK M. TAUTENHAHN—CANADIAN AMERICAN OIL COMPANY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

October Term, 1978

No. .....

Union Oil Company of California,

Petitioner,

vs.

Canadian American Oil Company, and Frederick M. Tautenhahn, Partners dba Frederick M. Tautenhahn—Canadian American Oil Company,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to reverse the judgment of the United States Court of Appeals for the Ninth Circuit in *Canadian American Oil Company and Frederick M. Tautenhahn, etc. v. Union Oil Company of California,* No. 76-1672.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 577 F.2d 468. It also appears at 1978-1 CCH Trade

Cases ¶ 61,910. The opinion of the district court (Appendix B, *infra*) is reported at 447 F.Supp. 473.

JURISDICTION

The judgment of the court of appeals was entered February 17, 1978. Petitioner filed a timely petition for rehearing, which was denied June 1, 1978, by an order of which a copy is attached as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

A large refiner and marketer of petroleum products is engaged extensively in interstate commerce, selling to many dealers in other states from a California refinery. It has a system, called price support, whereby it gives discounts equally to all its dealers in a price war area during a price war. Its contracts of sale to dealers do not require them to resell at any price but leave them free to resell at prices of their own selection. One of the dealers to whom it sold gasoline from its refinery on San Francisco Bay is a nearby California Bay Area dealer, who bought for resale locally, receiving delivery by intrastate transport. The refiner consistently gave this dealer the same price support discounts as it gave to all others. It declined, however, to give this particular dealer special discounts not available to others, allegedly because this dealer was underselling other local California purchasers. On the dealer's threat to sue for not getting the special discounts, the refiner terminated sales to it, and the dealer sued under the Sherman Act. The district court held, *on the evidence*, that there was no Sherman Act jurisdiction because the transaction with the local dealer was neither in the flow of interstate commerce nor affected interstate commerce. The court of appeals held that, *as a matter of law*, the dispute, although local, unique and uncharacteristic of the refiner's relations with its dealers generally, was

both in the flow of and affected interstate commerce on the basis that it must be assumed that refusal to give the special discount and the termination constituted an implied threat to all dealers anywhere to observe resale price maintenance.

Does the fact that a manufacturer is very large and engages extensively in interstate commerce mean that, as a matter of law, any dispute about pricing, local and unique in space and time, nevertheless implicates interstate commerce so as to confer Sherman Act jurisdiction and leaves nothing to the exclusive jurisdiction of the local state's antitrust law?

STATUTES INVOLVED

Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U.S.C. § 1):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, as amended:

Section 1 (15 U.S.C. § 12):

> "Antitrust laws" as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety . . . .
>
> "Commerce", as used herein, means trade or commerce among the several States and with foreign nations. . . .

Section 4 (15 U.S.C. § 15):

> Any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. The Parties and the Facts

The facts are taken from the opinions below; as stated in the opinion of the district court, petitioner "conceded many facts for the purposes of this motion only", i.e., the motion for summary judgment, reversed by the court of appeals (Appendix B).

Respondents (hereafter sometimes called "Canadian American") are owners and operators of retail gasoline service stations in the San Francisco Bay Area and purchased gasoline from several petroleum refiners in California, including Union. The gasoline Canadian American obtained from Union under the contracts described below came entirely from Union's nearby refinery at Oleum, California, on San Francisco Bay, by intrastate transport.

Union is a large, integrated refiner and marketer of petroleum products with extensive operations in interstate commerce and owns three refineries in California and two east of the Rocky Mountains. Some of the crude oil and other ingredients used in Union's Oleum refinery to produce gasoline and other refinery products come from outside of the State of California.

In April, 1972, Union and respondents executed contracts, which provided for sale of gasoline by Union to respondents at retail outlets in Fremont and San Jose, California at Union's Posted Dealer Purchase Price. Contemporaneously, respondents

requested Union to provide them with a discount below the contract price in the form of a sign rental contract. Union and respondents also discussed the possibility that in due course a jobbership agreement might be executed, pursuant to which respondents would receive discounts.

Union sells gasoline from Oleum to thousands of retail dealers throughout the Western United States, mostly at the Posted Dealer Purchase Price. Union does not as a general rule enter into agreements with dealers affording them so-called sign rental or jobbership discounts.

Respondents commenced selling Union's branded gasoline at their Fremont and San Jose outlets at retail prices consistently below the prevailing retail prices of other Union branded dealers in the area. Representatives of Union received inquiries from a few other Union dealers in the area about respondents' retail prices, which were passed along to respondents. Respondents continued with their same retail pricing practice. Shortly thereafter, Union declined to enter into a sign rental agreement with respondents. Respondents threatened to sue petitioner if they did not receive a sign rental discount. Faced with threatened litigation over the selling price of the gasoline, Union gave written notice of termination of the gasoline purchase agreements under a ninety day termination clause.

Within the ninety day termination period, respondents declined to pay Union for some $25,000 worth of gasoline already delivered, and Union terminated the agreements forthwith for breach. Respondents thereafter continued in business at their San Jose and Fremont locations selling gasoline supplied by Phillips Petroleum Company.

Union has a policy throughout the Western United States of giving discounts to its dealers from the Posted Dealer Purchase Price during periods of local price wars. There were price wars in the San Jose and Fremont areas during the time that respond-

ents were purchasing gasoline from Union, and respondents were accorded the same price support discounts that were extended to other Union dealers in those areas.

B. The Proceedings in the District Court.

The complaint sought treble damages under the Sherman Act for withholding of special price discounts not generally available to other dealers and subsequent termination of gasoline purchase agreements. Judgment was entered for Union, not on any motion addressed to the sufficiency of the complaint but on motion for summary judgment upon the findings of fact on the basis of undisputed affidavits that the transactions between respondents and petitioner were entirely unique and local and were neither in the flow of nor had an impact on commerce, that Union did not have an interstate system of resale price maintenance and that respondents' remedy against Union, if any, lay in California's little Sherman Act.

The district court, Judge William H. Orrick, Jr.[1] first concluded that Union's conduct vis-a-vis respondents was not in interstate commerce, because the gasoline was manufactured in California, sold in California, transported entirely in California, to respondents in California, for resale in California. Then, recognizing that jurisdiction under the Sherman Act would nevertheless exist if interstate commerce were affected, and proceeding upon the principle that the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects interstate commerce, the district court closely examined whether there was any effect on interstate commerce. It *found* no evidence that "the alleged price fix or [the] termination as Union dealers in any way reduced the

1. Judge Orrick was called to the bench after a distinguished career as a lawyer in both private and public antitrust practice. He served as Assistant Attorney General, Department of Justice, Antitrust Division, 1963-65. Who's Who In America, 1978-79.

quantity of gasoline produced" at Oleum and available for shipment out of the state or in any way "affects the continued interstate purchase of supplies by Union" (Appendix B, p. 16). Then, addressing respondents' contention that Union's price support plan and its conduct toward respondents had a coercive leverage on Union dealers in other states and thereby affected interstate commerce, it *found* the contention unsupported. It found that Union's sales contracts with dealers did not require them to resell at any price but left them free to resell at prices of their own selection, that the special discounts which respondents wanted were not commonly given, and that the controversy was not an exemplar of relations with other dealers. Dealers were instructed that they were "free to set their own retail prices." Coercive withholding of a sign rental allowance and a jobbership was not inherent in Union's pricing plan. These benefits, assumed for purposes of the motion to have been promised to respondents, were unusual and due to respondents' unique position as large volume dealers. "Plaintiffs do not seriously assert that the promised discount and jobbership were somehow part of the wholesale pricing system or were promised to dealers on a wide-scale basis." "Union did not attempt to regulate plaintiffs' prices by a threatened or actual attempt to withdraw price supports". (Appendix B, p. 18.) The court further found (*Id.*): "At most, the undisputed facts establish that when plaintiffs exercised their independent pricing discretion, Union attempted to keep them in line by coercive techniques independent of its widespread pricing program"—"an isolated, atypical" event, which would not have set a threatening example to other retailers "who had never been promised the business benefits withheld in the first place".

C. The Opinion of the Court of Appeals.

The court of appeals reversed in a *per curiam* opinion. It ignored the facts found by the district court on undisputed evi-

dence and held that Union's activity in interstate commerce is so extensive that *as a matter of law* Union's conduct toward one local dealer, however unique in its facts and isolated in time and place, coerced all dealers everywhere and therefore affected interstate commerce.

The statements and conclusions of the opinion are essentially as follows (Appendix A, pp. 5-6):

> Union is a completely integrated enterprise. Union produces vast quantities of crude oil and natural gas. It has three refineries in California and one in Texas. About one-third of the crude oil utilized by the Union refinery in the Bay Area is shipped from its resources in Alaska. Union also transports crude oil and petroleum products in its own and in leased ships along the seacoast of the West, as well as in foreign commerce. The Northern California market consumes over half of the volume of Oleum refinery, and the remainder is moved by tanker to other markets. The same refinery supplies large amounts of automotive gasoline to the Ports of Portland and Seattle for distribution in those areas, as well as to Hawaii. Union owns and operates petroleum pipelines both intra- and interstate.
>
> The Oleum refinery utilizes crude oil supplied from Alaska, as well as additives, such as tetraethyl lead, which is supplied from California, Texas and Louisiana.
>
> Further details of Union's operations are unnecessary to demonstrate that the district court's conclusions that the acts complained of did not occur within the flow of interstate commerce nor substantially affect interstate commerce cannot be sustained.
>
> . . . .
>
> No detailed exegesis of Union's production, refining, transporting, marketing, and pricing system is necessary to determine, as a matter of law, that Union's activities, including those in which it was engaged with the appellants, both affected the flow of interstate commerce and had a significant impact on interstate commerce, thus supplying the interstate nexus.

The foregoing recitation is entirely unaccompanied by any analysis, and no effort is made to explain why "no detailed exegesis is required." Such exegesis can be found in the following *ex cathedra* assumptions (Appendix A, pp. 8-9, emphasis ours):

> . . . .
>
> For Sherman Act purposes, it matters not at all whether Union chose to drive appellants out of its market by exercising a 90-day option to cancel their dealer contract or by withdrawing its price supports. The impact is identical. *Independent dealers similarly situated to appellants in either event received the message that obdurate price cutters faced dealer contract cancellation.*
>
> . . . . *The effect of Union's conduct is to eliminate effective intrabrand price competition among Union dealers within its Western Region.* Viewed in the aggregate, *an absence of effective intrabrand price competition produces a substantial economic impact upon interstate commerce.*
>
> The district court assumed that no coercive effect upon other dealers could have been exerted when Union withheld the jobbership and withheld the sign rental discount because other dealers in the area had not been promised similar benefits. That assumption overlooks the practical effect of Union's action. The point is that *other dealers were made aware that Union would retaliate against any dealer who failed to follow Union's pricing dictates.* Especially is that true on this record where Union undertook retaliatory action in response to complaints from *Union dealers who were following Union's pricing policies.* Based upon *the averments of the complaint, which must be taken as true at this juncture of the case,* Union's alleged conduct in violation of the antitrust laws adversely affected the appellants and *potentially created anticompetitive effects upon other dealers in the ten states comprising Union's Western Region.* (*Simpson v. Union Oil Company, supra,* 377 U.S. 13; *Boddicker v. Arizona State Dental Association,* (9th Cir. 1977) 549 F.2d 626; *Lehrman v. Gulf Oil Corporation, supra,* 464 F.2d 26.)

We have italicized the passages that represent conjecture by the court of appeals. The remainder is the reference to the "averments of the complaint". The suggestion that those averments "must be taken as true at this juncture of the case" is patently wrong. If this case had come before that court on appeal from a judgment on a motion addressed to the sufficiency of the complaint, such conjectures, within the ambit of pleading generalities, might be permissible. But, inasmuch as the case was before the court of appeals on a judgment based on findings of fact, that court has substituted conclusions supposedly mandated by law for the actuality of the facts found.

As the district court found, respondents' purchase agreement was cancelled because of a dispute over the sign rental discount and the refusal of respondents to pay for gasoline. At most, the evidence is susceptible to the inference that Union was unwilling to give a price cutter discounts not available to other competing dealers. There was thus no basis for a message to "dealers similarly situated", because there were none.

Nor was there basis for the legal conclusion that "other dealers were made aware that Union would retaliate" against dealers who declined to follow Union's pricing dictates, or that any Union dealer followed Union's pricing dictates.[2]

When thus placed in context, it follows that the opinion's analysis comes to this: that an impact upon commerce must be inferred from the withholding of special pricing benefits to a single price cutting dealer because of "*potentially* created anti-competitive effects" (emphasis ours) upon other dealers throughout Union's Western Region without any showing by respondents that such dealers are remotely interested or that any has even been informed.

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2. The district court found that it is Union's policy not to make retail pricing suggestions to its dealers. The only dealer other than respondents whose testimony is of record testified that Union did not suggest retail prices to him and that he established retail prices in competition with the Standard dealer across the street.

REASONS FOR GRANTING THE WRIT

The question stated above calls for a granting of the writ because it involves the extent of the intrusion of the federal antitrust laws by the federal courts into matters that are essentially local and should be subjects for exercise of state court jurisdiction under California's little Sherman Act.

The court below is the same court that had to be reversed in *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974), and its approach to jurisdiction in this case is precisely the same as this Court rejected there. Indeed, the *Copp* case concerned the petitioner, Union, and it was only an accident of procedure that put the name of Gulf Oil Corporation in the title of the case. The very same fact that Union was extensively engaged in interstate commerce, which animated the court below, was the fact that animated the same court in the *Copp* case.

The decision below represents a return by the court of appeals to the *per se* nexus of commerce test rejected by this Court in *Gulf Oil Corporation v. Copp Paving Co., supra,* and creates a conflict among the circuits.

The Court of Appeals Has Dispensed With the Particularized Proof of Sherman Act Jurisdiction Required by the Prior Decisions of This Court

Under the previous decisions of this Court, it has been incumbent upon a plaintiff in a Sherman Act case to prove that the acts allegedly illegal under the Sherman Act either (1) occurred within the flow of commerce or (2) had a substantial and adverse effect upon commerce. *United States v. Yellow Cab Co.*, 332 U.S. 218, 228-29 (1947); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780 (1975); *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976); *cf. Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). These decisions and others have followed an analytical approach in determining precisely what activities did or did not occur within the flow of, or have an effect upon, precisely what commerce.

In short, the opinion below, if allowed to stand, would require that every case of alleged restraints of trade involving a corporation engaged in interstate commerce be brought to the federal court house. California's little Sherman Act (Calif. Bus. & Prof. Code §§ 16,600, et seq.) and similar state statutes would be limited to disputes between local artisans, garbage collectors and the like. The dockets of the federal courts will grow.[3]

A. THE FLOW OF COMMERCE

As set forth above, the opinion summarizes in three short paragraphs the evidence upon which it concludes that the acts complained of occurred within the flow of interstate commerce. The first of these paragraphs recites essentially that Union is a large integrated oil company engaged in significant interstate commerce in the production of natural gas and crude oil and the refining and marketing of refinery products. The second paragraph states that the Oleum refinery utilizes crude oil and additives, imported from other states. The third paragraph asserts: "Further details of Union's operations are unnecessary to demonstrate that the district court's conclusions" concerning the flow of interstate commerce cannot be sustained. It necessarily follows that the court of appeals bases its conclusions respecting the flow of commerce on either or both of the following propositions:

1. The activities are in the flow of commerce because Union is a large interstate company.
2. The activities are in the flow of commerce because the crude oil and other ingredients used by Union in producing refinery products at its Oleum refinery come from outside California.

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3. It is perhaps ironic that a decision expanding the work load of the federal judiciary should emerge from the Ninth Circuit. "This circuit has the second highest number of filings per judge and the highest number of cases pending per judge. With only 13 active judges it is literally overwhelmed." *Senate Committee on the Judiciary*, SENATE REPORT NO. 95-117, 95th CONG. 1st SESS. (1977), p. 35.

The second proposition is in conflict with the decisions of other circuits, and the first is in conflict with prior decisions of this Court.

The Tenth Circuit and the Fifth Circuit have both held that the refining of gasoline so transforms the component elements that the transporting of the components across state lines to the refinery does not place the refinery products within the flow of commerce for purposes of the antitrust laws. *Belliston v. Texaco, Inc.*, 455 F.2d 172 (10th Cir. 1972), *cert. denied* 408 U.S. 923, *rehearing denied*, 409 U.S. 1001; *Bacon v. Texaco, Inc.*, 503 F.2d 946, 948 (5th Cir. 1974), *cert. denied* 420 U.S. 1005.

In *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, the decision of the court of appeals finding the intrastate sale of asphalt by a large integrated oil company for construction of an interstate highway to be in the flow of commerce for Robinson-Patman Act purposes was reversed. The Court's opinion specifically notes (419 U.S. at 189):

> "The Companies sell liquid asphalt to their subsidiaries and other firms throughout the Western States. The market in liquid asphalt is interstate, and each company concedes that it engages in interstate commerce."

In the course of its analysis of the flow of commerce test for Robinson-Patman Act purposes, the Court observed by way of *obiter dictum* that the same analytical approach is required under the Sherman Act as well (419 U.S. at 197 n):

> "The jurisdictional inquiry under general prohibitions like these Acts and § 1 of the Sherman Act . . . [turns] on the circumstances presented in each case. . . ."

In language that is easily transferrable to the philosophy manifested by the opinion below in this case, the Court characterized the discredited arguments of *Copp* as follows (419 U.S. at 196):

> Copp's "in commerce" argument rests essentially on a purely formal "nexus" to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of

> petitioners with respect to an ingredient of a highway is *per se* "in commerce". Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities . . . . The chain of connection has no logical end point . . . . [T]he definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws. See *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947).

By substituting "refinery" for "highway" in the foregoing passage, the analogy to the opinion below in this case would be complete. The court of appeals has thus once again adopted a *per se* nexus to commerce theory rejected a scant three years ago by this Court. *Cf. United States v. American Bldg. Maint. Industries*, 422 U.S. 271, 283-86 (1975).

B. SUBSTANTIAL IMPACT ON COMMERCE

The opinion below rests its conclusions respecting an impact on commerce on two grounds: (1) it relies on the same unanalyzed mass of information concerning Union's interstate activities that underlie its conclusion respecting the flow of commerce (Appendix A, pp. 5-6), and (2) it finds an impact on commerce arising from Union's system of providing price support to dealers everywhere during price wars (Appendix A, pp. 8-9). The opinion is wrong in both respects.

1. Union's Interstate Activities

The recent decisions of this Court that have sustained Sherman Act jurisdiction have found a substantial impact on specific commerce. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781-83 (1975) the district court found on the basis of the evidence that the legal fees in question were for legal services that were indispensable to, and formed an integral part of, substantial interstate real estate financing transactions. In *Hospital Bldg. Co. v. Rex Hospital Trustees, supra*, 425 U.S. at 743-44, which was decided below on the pleadings, the Court found allegations in the com-

plaint that the alleged conspiracy to block hospital expansion would curtail the flow of out of state supplies with a value in the hundreds of thousands of dollars and would foreclose a proposed multi-million dollar interstate financing transaction.

Whether or not any such showing could have been made in the district court, none was. The court of appeals thus substituted a notion of necessary legal conclusion for a finding on undisputed evidence.

2. Union's System of Price Support

In finding a "substantial effect" on interstate commerce, the opinion focuses upon Union's price support system; it concludes that withholding sign rental and jobbership discounts in retaliation for respondents' renegade retail pricing policies and consequent termination of supply contracts had a potentially adverse effect on other dealers who received price support. (Appendix A, pp. 7-9.) In so doing, the court has misapplied *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) as expanded by the Fifth Circuit in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972) *cert. denied* 409 U.S. 1077.

In *Simpson* the Court struck down Union's longstanding system of supplying gasoline to independent dealers on consignment and fixing the price of gasoline at the pump as an invalid retail price maintenance system. Since the invalid system was concededly employed in numerous states, it did not require extensive discussion for the Court to conclude that "it mattered not that the complainant may be only one merchant" (377 U.S. at 16); his damage resulted directly from the impact of an illegal interstate system.

In *Lehrman* Gulf employed an interstate wholesale price support system (called "TCA") that resulted in reduced wholesale prices to Gulf dealers during price wars and provided the dealers with a suggested retail price. When the plaintiff refused to post the suggested retail prices, his TCA was withdrawn, and his business subsequently failed. As an alternative ground for finding a

nexus to commerce, the Court focused on the TCA system. Unlike the consignment system in *Simpson,* the Court found the TCA system to be "benign on its face", but when the system itself was used by withholding price support coercively from dealers who did not follow Gulf's suggested retail prices, the system became illegal, and its employment against a single dealer, as in *Simpson,* provided the nexus to commerce (464 F.2d at 33):

> The TCA system is, and always will be, a "contract combination, or conspiracy." It is, however, a "contract, combination, or conspiracy . . . in restraint of trade . . . among the several States," only insofar as and at such times as Gulf couples the TCA system with a credible threat to vary dealer TCA's as a means of coercing obedience to a Gulf-determined schedule of retail prices. This threat was credible and outstanding in the wake of Gulf's treatment of Lehrman; at the time Lehrman brought suit, the TCA system operated as a widespread conspiracy in restraint of trade and Lehrman had been injured "by reason of" the TCA system. In short, then, the TCA system as a whole furnishes a jurisdictional handle because the system, in all its area of application, was a coercive device for resale price maintenance . . . .

The case at bar differs from *Lehrman* in two important respects:

(a) Union's system of price support was not accompanied by a suggested retail price, and the system was not coercively used against any Union dealer. In particular, respondents had full benefit of the system at all times they were purchasing gasoline from Union; and

(b) Union's dispute with respondents related to their desire to obtain sign rental and jobbership discounts, which are not the subject of any systemized use throughout Union's Western Region. As the district court found (Appendix B, p. 18), "plaintiffs do not seriously assert that the promised discount and jobbership were somehow part of the wholesale pricing system or were promised to dealers on a widescale basis."

The foregoing analysis was clear enough to the district court; the opinion of the court of appeals, however, simply brushes it aside, and leaps to a conclusion of law that any withholding of a benefit of any kind to a dealer of a large company engaged in interstate commerce for its failure to adhere to alleged pricing instructions has an automatic impact upon a price support program, no matter how unique that benefit may be.

The decision of the court below is necessarily inconsistent with *Butera v. Sun Oil Co.,* 496 F.2d 434 (1st Cir. 1974). While *Butera* did not turn on jurisdiction, the court held that a price support system similar to Union's, except that Sun suggested a retail price to its dealers, was wholly lawful under the Sherman Act in the absence of proof that it was used coercively against any dealer. The court below in effect finds that Union's price support system is unlawful, even though not used coercively.

CONCLUSION

We respectfully pray that a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MOSES LASKY
Attorney for Petitioner

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Filed Feb 17 1978
Clerk, U.S. Court of Appeals

Canadian American Oil Company and Frederick M. Tautenhahn, etc. *Plaintiffs-Appellants,* vs. Union Oil Company of California, *Defendant-Appellee.*	No. 76-1672

OPINION

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

PER CURIAM:

Appellants appeal from a judgment dismissing their antitrust complaint against Union Oil Company of California ("Union"). The district court concluded that it lacked jurisdiction of the subject matter because the complaint failed to state sufficient facts to demonstrate that the challenged activities had sufficient impact upon the flow of interstate commerce to permit appellants to invoke the Sherman Act, Sections 1 and 2 (15 U.S.C. §§ 1, 2). Appellants contend that the complaint stated more than adequate

*Honorable William J. Jameson, Senior United States District Judge.

facts to establish that the acts complained of occurred within the flow of interstate commerce and that those acts which occurred wholly intrastate substantially affected interstate commerce. We agree with the appellants.

Appellants also claim that the district court abused its discretion in issuing unduly restrictive discovery orders and in preventing appellants from amending their complaint to assert cross-claims for fraudulent promises of a sign rental allowance to counter an affirmative defense in the answer. We remand for reconsideration in the light of our disposition of the jurisdictional issue. We dismiss the third contention for mootness.

Appellants operate large volume gasoline service stations in the greater San Francisco Bay Area. Among their holdings are the two service station properties involved in this case, Alec's in San Jose and Alex's in Fremont. Appellants' combined ownership of the two stations in issue, together with other service stations in the area, gave them power to offer to any gasoline supplier outlets for about 13 million gallons of gasoline per year.

In February and March, 1972, appellants began negotiating a gasoline supply contract with Union for delivery to two of their service stations. In April, 1972, Union and appellants executed a gasoline purchase contract for Union brand gasoline to be sold at their San Jose and Fremont stations. The contract provided that appellants would pay the standard "Posted Dealer Purchase Price" for the gasoline, but all parties understood that appellants would shortly be entitled to a two cents per gallon discount on the price, which was to be given by Union in the form of a sign rental agreement. Appellants were also led to believe that within a few months, they would be entitled to a Union jobbership, if they showed themselves to be satisfactory dealers. The possibility of obtaining the jobbership particularly interested appellants and was one of the main inducements to them to undertake dealing with Union.

Appellants began selling Union gasoline at their San Jose and Fremont stations in April, 1972. They priced their gasoline from two to five cents below the prevailing market prices for other major brand gasolines in the area. Competing Union dealers complained about the price cutting to Union. Union representatives contacted appellants and urged them to keep their prices within two cents of the prevailing market price. Appellants, however, persisted in their price-cutting practices. Union countered the refusal of appellants to raise their prices by denying appellants' request for the promised sign rental discount and for the jobbership. Appellants threatened to sue Union for its refusal to bestow the promised benefits, and Union retaliated by invoking the 90-day termination clause on their gasoline supply contract and terminated appellants as Union dealers. Appellants remained in business at the two stations by selling Phillips Petroleum products at the two locations.

Appellants received approximately $35,000.00 of gasoline from Union on Labor Day weekend, 1972. Union's representative did not collect $10,000.00 on the Friday before the weekend and did not notify Union's supply terminals. Appellants deducted the amount of sign rental allowances at two cents per gallon from the amount it owed Union for gasoline purchases and advised Union that they would not pay any more, claiming the sign rental allowance as a legitimate offset. Thereafter, appellants paid Union approximately $10,000.00 for gasoline delivered on the Labor Day weekend, and Union filed a collection action in the state court to recover the remaining price. Appellants filed this antitrust action, and Union counterclaimed for goods sold and delivered and for conversion. Appellants sought damages for refusal to pay the two-cent per gallon sign rental allowance, for failure to inform appellants of adjustment in the price of gasoline, for loss of profits in the cancellation of the three-year supply agreement as to the two stations, and for loss of profits arising from the

refusal to allow them the jobbership agreement because of their pricing policies.

The two service stations are located in shopping centers within the borders of California, and neither is adjacent to an interstate highway. Their customers are largely local suburban residents. During 1972, appellants' combined purchases for both stations varied from a high of 284,512 gallons for the month of May to a low of 273,250 gallons in July. All of the Union gasoline distributed to appellants was refined in California at Union's Oleum refinery. During 1972, total shipments of gasoline from the Oleum refinery averaged 33,321 barrels per day. From Oleum, the gasoline was shipped via pipeline to San Jose, California, and then trucked from the San Jose terminal to appellants' stations. Appellants allege that Union, through exchange agreements with other major gasoline suppliers, also mingled out-of-state gasoline in the transporting pipeline. That allegation, however, has not been substantiated through discovery. It is undisputed that large percentages of the raw ingredients used in refining the gasoline are shipped to the Oleum refinery from out of state.

While appellants were Union dealers, they purchased their gasoline under a wholesale pricing system which Union utilized throughout the ten states comprising its Western Region. Under the plan, Union would publish "Posted Dealer Purchase Prices" for a given region. The posted dealer price fluctuated in accordance with the prevailing retail prices charged by major competitors in a given region. Union established a retail price of $.082 above the Posted Dealer Purchase Price as a cut-off point for price supports to its dealers. A retail price of $.082 above the Posted Dealer Purchase Price was defined as the "Adjustment Price." If the prevailing retail price was less than the Adjustment Price, Union would reduce its Posted Dealer Purchase Price downward to $.007 for each cent per gallon that the prevailing retail price had fallen below the Adjustment Price. Although the Posted Dealer Purchase Price for individual zones within the Western Region would vary, depending on the prevailing competitor retail price in a given zone and the concomitant need for Union to provide its dealers with price supports, the pricing system was standardized throughout the Western Region. Union dealers were required to purchase under this standard wholesale system; however, their purchase contracts did not require them to sell at the retail level at any set prices.

Union is a completely integrated enterprise. Union produces vast quantities of crude oil and natural gas. It has three refineries in California and one in Texas. About one-third of the crude oil utilized by the Union refinery in the Bay Area is shipped from its resources in Alaska. Union also transports crude oil and petroleum products in its own and in leased ships along the seacoast of the West, as well as in foreign commerce. The Northern California market consumes over half of the volume of Oleum refinery, and the remainder is moved by tanker to other markets. The same refinery supplies large amounts of automotive gasoline to the Ports of Portland and Seattle for distribution in those areas, as well as to Hawaii. Union owns and operates petroleum pipelines both intra- and interstate.

The Oleum refinery utilizes crude oil supplied from Alaska, as well as additives, such as tetraethyl lead, which is supplied from California, Texas, and Louisiana.

Further details of Union's operations are unnecessary to demonstrate that the district court's conclusions that the acts complained of did not occur within the flow of interstate commerce nor substantially affect interstate commerce cannot be sustained.

As we pointed out in *Gough v. Rossmoor Corp.* (9th Cir. 1973) 487 F.2d 373, 375: "The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for

this nation a competitive business economy to the full extent that Congress could do so under its Constitutional power to regulate interstate and foreign commerce."

No detailed exegesis of Union's production, refining, transporting, marketing, and pricing system is necessary to determine, as a matter of law, that Union's activities, including those in which it was engaged with the appellants, both affected the flow of interstate commerce and had a significant impact on interstate commerce, thus supplying the interstate nexus. As the Supreme Court pointed out in *Gulf Oil Corporation v. Copp Paving Co.* (1974) 419 U.S. 186, 194-95: "[I]n enacting § 1 Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . .' [citation omitted]. Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. [citation omitted] 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949)." (*Accord: Hospital Building Co. v. Rex Hospital Trustees* (1976) 425 U.S. 738, 743, *quoting Gulf Oil Corporation* with approval.)

Union's conduct of its business with the appellants, for jurisdictional purposes, was an ingredient of Union's interstate production and distribution scheme. Union's distribution of gasoline to appellants was integrally related to its multistate regional pricing system. It cannot be broken away from the interstate character of Union's commerce in petroleum products by isolating Union's Oleum plant from the interstate production and distribution system of which it was an integral part. Union's pricing policy with respect to the appellants and to its other California dealers has

a "substantial effect" on interstate commerce even if its "local" pricing policies were not directed toward interstate commerce and even if its pricing mechanisms fell "far short of causing enterprises to fold or affecting market price." (*Hospital Building Co. v. Rex Hospital Trustees, supra,* 425 U.S. at 745.)

The district court recognized that the appellants lost both the two-cent per gallon discount on the price and the opportunity for a jobbership in retaliation for appellants' "renegade pricing policies." The court nevertheless held that Union's conduct was outside the ambit of *Simpson v. Union Oil Company* (1964) 377 U.S. 13, and *Lehrman v. Gulf Oil Corporation* (5th Cir. 1972) 464 F.2d 26, because "the element of coercive leverage inherent in the pricing policy is missing." "At most, the undisputed facts establish that when plaintiffs exercised their independent pricing discretion, Union attempted to keep them in line by coercive techniques independent of its widespread pricing program. An isolated, atypical application of coercion upon dealers who are purchasing gasoline under an inherently benign pricing system would not have set a threatening example to other wholesalers who had never been promised the business benefits withheld in the first place. The coercion applied to plaintiffs had no more effect on the gasoline industry than the regulation of the prices charged by plaintiffs in their local operations."

These conclusions rest upon a mischaracterization of the conduct attributed to Union and upon a misreading of both *Simpson* and *Lehrman*. The district court apparently assumed that *Simpson* did not apply because Union's price support system was not on its face a forbidden price-fixing agreement, and that *Lehrman* did not apply because the coercive techniques used to force appellants to raise their prices did not involve withdrawal of the company's price support program. The district court's restrictive reading of *Simpson* and *Lehrman* is unjustified.

Resale price maintenance in violation of the Sherman Act is an actionable wrong whenever the restraint of trade or monopolistic practice has an impact on the market, and "it matters not that the complainant may be only one merchant." (*Simpson v. Union Oil Company, supra,* 377 U.S. at 16.) *Lehrman* extended this principle to find jurisdiction under the Sherman Act for an independent service station operator in Texas: "Because of the broad scope of the [price support] mechanism, however inherently compatible with competition, the treatment of Lehrman when he disobeyed Gulf's price 'suggestions' transformed a practice benign on its face into a coercive practice with untold geographical potential for deterring Gulf retailers from freely determining their own retail prices. . . ." (464 F.2d at 32.)

Judge Wisdom rejected Gulf's proffered distinction that its price support program was a facially benign business practice subject to intermittent anticompetitive abuse "as applied" only on a case-by-case basis, while in *Simpson,* the single, intrastate operator was permitted Sherman Act jurisdiction because Union's "consignment agreement" was anticompetitive "on its face." Judge Wisdom noted that the policies of the Sherman Act would be enfeebled if *Simpson* could be distinguished as Union successfully urged below: "It would be exceedingly unfortunate if large enterprises could, without federal antitrust liability, use small, intrastate operators as a way of making known certain unspoken and unwritten features of broadly utilized business practices which are not anticompetitive on their face." (464 F.2d at 33.)

For Sherman Act purposes, it matters not at all whether Union chose to drive appellants out of its market by exercising a 90-day option to cancel their dealer contract or by withdrawing its price supports. The impact is identical. Independent dealers similarly situated to appellants in either event received the message that obdurate price cutters faced dealer contract cancellation.

We cannot say that the omnipresent threat of dealer contract cancellation for failure to conform one's retail prices to those

announced by Union's price support program is not coercive. The effect of Union's conduct is to eliminate effective intrabrand price competition among Union dealers within its Western Region. Viewed in the aggregate, an absence of effective intrabrand price competition produces a substantial economic impact upon interstate commerce.

The district court assumed that no coercive effect upon other dealers could have been exerted when Union withheld the jobbership and withheld the sign rental discount because other dealers in the area had not been promised similar benefits. That assumption overlooks the practical effect of Union's action. The point is that other dealers were made aware that Union would retaliate against any dealer who failed to follow Union's pricing dictates. Especially is that true on this record where Union undertook retaliatory action in response to complaints from Union dealers who were following Union's pricing policies. Based upon the averments of the complaint, which must be taken as true at this juncture of the case, Union's alleged conduct in violation of the antitrust laws adversely affected the appellants and potentially created anticompetitive effects upon other dealers in the ten states comprising Union's Western Region. (*Simpson v. Union Oil Company, supra,* 377 U.S. 13; *Boddicker v. Arizona State Dental Association* (9th Cir. 1977) 549 F.2d 626; *Lehrman v. Gulf Oil Corporation, supra,* 464 F.2d 26.)

Appellants have asked us to overturn several discovery rulings of the district court relating to: (1) the correspondence to and from Union division managers about its resale price-fixing programs for the years other than 1972; (2) the complete credit files of Union concerning appellants; (3) Union's authentication of documents pertaining to its pricing program; (4) disclosure of all special arrangements with resellers who owned or controlled the real property; and (5) information about exchange agree-

ments and advertising expenditures. The district court, of course, has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear abuse of discretion.

The district court's extremely restrictive rulings on discovery issues appear to have been substantially influenced by its erroneous view that the activities charged related only to intrastate commerce and by its erroneous assumption that the discovery rules, as presently framed, must be relevant to the precise issues framed by the pleadings, rather than by the general relevance to the subject matter. We decline at this time to review each and every one of these discovery rulings; rather, we direct the district court to reconsider the challenged rulings in the light of our views as expressed in this case, together with *Simpson v. Union Oil Company, supra,* 377 U.S. 13; *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690; and *Cornwell Quality Tools Co. v. CTS Co., Inc.* (9th Cir. 1971) 446 F.2d 825.

We do not discuss the claim that the district court abused its discretion in preventing appellants from amending their complaint to assert cross-claims for alleged fraudulent promises of sign rental. This issue has become moot because the underlying dispute was resolved in the state court action decided after the briefs in this case were filed.

The judgment is reversed and the cause is remanded for further proceedings consistent with the views herein expressed.

Appendix B

United States District Court
Northern District of California

Original Filed:
Jan 23 1976
Clerk, U.S. Dist. Court
San Francisco

Canadian American Oil Company, et al., *Plaintiffs,* vs. Union Oil Company of California, *Defendant.*	No. C-72-2034 WHO

MEMORANDUM OPINION AND ORDER

This action calls upon the Court to consider the limitations on its jurisdiction under the federal antitrust laws. Plaintiffs, the partnership of Canadian American Oil Company and Fred Tautenhan, were former dealers of Union Oil Company of California (Union) gasoline. They allege that defendant has enforced and conspired to enforce a resale price maintenance scheme in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) (the Act). Plaintiffs further allege that Union has utilized this price maintenance program in an attempt to monopolize the sale of gasoline in the San Jose-Fremont, California, region in violation of Section 2 of the Act (15 U.S.C. § 2).

Union, having conceded many facts for the purposes of this motion only, has moved for summary judgment based on a lack of federal jurisdiction. Specifically, defendant claims the acts complained of by plaintiffs are not in interstate commerce. The

Court, having considered the memoranda and affidavits on file in this action, as well as the oral arguments of counsel, for the reasons hereinafter set forth, grants defendant's motion for summary judgment.

I. *Facts*

Plaintiffs own and operate a number of retail gasoline stations in California. Their various stations are supplied by several of the major gasoline suppliers. In February and March, 1972, plaintiff began negotiating a gasoline supply contract with Union for deliveries to two of plaintiffs' service stations. In April, 1972, Union and plaintiffs executed a gasoline purchase contract for the sale of Union branded gasoline at plaintiffs' San Jose station and plaintiffs' Fremont station. The contracts provided that plaintiffs would pay the standard Posted Dealer Purchase Price for the gasoline, but all parties understood that plaintiffs would shortly be entitled to a two cents per gallon discount on the price in the form of a sign rental agreement. The plaintiffs were also led to believe that within a few months they would be entitled to a Union jobbership provided they showed themselves to be satisfactory dealers. The possibility of obtaining the jobbership particularly interested plaintiffs and was one of the main inducements for them to deal with Union.

Plaintiffs began selling Union gasoline at their San Jose and Fremont stations in April, 1972. They priced their gasoline from two to five cents below the prevailing market prices for other major branded gasoline in the area. Responding to complaints of price-cutting from competing Union dealers, Union representatives contacted plaintiffs and urged them to keep their prices within two cents of the prevailing market price. Plaintiffs, however, persisted in their price-cutting practices. As a result of these renegade pricing policies, plaintiffs' requests for the promised sign rental discount as well as for the jobbership were denied. Plaintiffs threatened to sue Union for its refusal to bestow the promised benefits. Union then invoked the ninety-day termination clause in the gasoline supply contract and terminated plaintiffs as Union dealers. Plaintiffs remained in business at their San Jose and Fremont gasoline stations selling Phillips Petroleum gasoline at these two service station locations.

Both plaintiffs' San Jose and Fremont gas stations were located in shopping centers well within the borders of California. Neither station was located adjacent to an interstate highway. Their customers were largely local suburban residents. During 1972 plaintiffs combined purchases for both stations varied from a high of 284,512 gallons for the month of May to a low of 273,250 gallons in July. All of the Union gasoline distributed to plaintiffs was refined in California at Union's Oleum refinery. During 1972 total shipments of gasoline from the Oleum refinery averaged 33,321 barrels per day. From Oleum the gasoline was shipped via pipeline to San Jose, California, and then by truck from the San Jose terminal to plaintiffs' stations. Although plaintiffs allege that Union, through exchange agreements with other major gasoline suppliers, also mingled out-of-state gasoline in the transporting pipeline, they have been unable to document that they ever received any of this out-of-state gasoline. However, it is clear that large percentages of the raw ingredients used in refining the gasoline are shipped to the Oleum refinery from out of state.

While plaintiffs were Union dealers they purchased their gasoline under a wholesale pricing system which Union utilized throughout the ten states comprising its Western Region. Under the plan Union would publish Posted Dealer Purchase Prices for a given region. The Posted Dealer Price fluctuated in accordance with the prevailing retail prices charged by major competitors in a given region. Union established a retail price of $.082 above the Posted Dealer Purchase Price as a cutoff point for price supports to its dealers. A retail price of $.082 above

the Posted Dealer Purchase Price was defined as the Adjustment Price. If the prevailing retail price was less than the Adjustment Price, Union would then reduce its Posted Dealer Purchase Price downward by $.007 for each cent per gallon that the prevailing retail price had fallen below the Adjustment Price. Although the Posted Dealer Purchase Price for individual zones within the Western Region would vary, depending on the prevailing competitor retail prices in a given zone and the concomitant need for Union to provide its dealers with price supports, the pricing system was standardized throughout the Western Region states. Union dealers were required to purchase under this standard wholesale system; however, their purchase contracts did not require them to sell at the retail level at any set prices.

II. *Jurisdiction*

A. *The Flow-of-Interstate-Commerce-Test*

Before the federal courts have jurisdiction to review alleged antitrust violations, plaintiffs must establish (1) that the acts complained of occurred within the flow of interstate commerce or (2) that the acts complained of, while wholly intrastate, substantially affected interstate commerce. *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732 (9th Cir. 1954), *cert. denied* 348 U.S. 817 (1954). Plaintiffs contend that they satisfy the jurisdictional requirements under each of these tests. I disagree.

Plaintiffs first assert that the interstate shipment of the raw ingredients used in producing the end-product gasoline brings the gasoline itself within the flow of commerce. However, it is well settled that when raw ingredients are shipped to a manufacturer for processing, the manufacturer is the intended ultimate consumer of the raw goods, and consequently the chain of flow stops at the processing plant. 1 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 5.01(2) at 5-57 (1971). The only major

exception to this general break-in flow principle applies to highly perishable foodstuffs such as dairy products where the raw ingredients must be processed so quickly that the shipment of the raw goods to the processor, the processing at the dairy plant, and the shipment of the end product to the ultimate consumer has been considered one uninterrupted chain. *Peveley Dairy Co. v. United States,* 178 F.2d 363 (8th Cir. 1949), *cert. denied* 339 U.S. 942 (1950). The components of gasoline being far less perishable than dairy foodstuffs would not invoke this break-in-flow exception.

In considering this same question of continuity of flow between the raw and end products in the gasoline industry, the Tenth Circuit in *Belliston v. Texaco, Inc.,* 455 F.2d 175 (1972), concluded that the refining process so transforms the component elements that "they cannot be equated as the 'same stuff' to satisfy the requirements of the 'flow of commerce' theory". *Belliston v. Texaco, Inc., supra,* at 180. Although the court in *Belliston* was specifically discussing the question of jurisdiction under the more stringent jurisdictional tests of the Robinson-Patman Act (15 U.S.C. § 13(a)) rather than under the Sherman Act which is relied on in the instant case, the question of continuity of flow for ingredients and end products in the gasoline industry would be the same under both statutes, and *Belliston* is applicable. I find that plaintiffs have failed to establish that the acts complained of occurred within the flow of commerce.

B. *Affecting-Commerce Test*

Nor does the Court find that plaintiffs have satisfied the "affecting-commerce" jurisdictional test. Although plaintiffs point to the general interstate aspects of Union's large scale business dealings, the test of jurisdiction under the Sherman Act "is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the inter-

state commerce of such a business". *Page v. Work,* 290 F.2d 323, 330 (9th Cir. 1961), *cert. denied* 368 U.S. 875 (1961).

Again plaintiffs point to the purchases of substantial quantities of out-of-state supplies used in refining the gasoline and assert that the claimed antitrust violations would have a direct, substantial and adverse effect on these interstate shipments. However, plaintiffs have failed to establish that the alleged price fix or their termination as Union dealers in any way reduced the quantity of gasoline produced by Union at its Oleum refinery. Nor have they shown that the alleged violations reduced the out-of-state purchases of raw ingredients used in the production of gasoline. Almost all businesses, no matter how local, will utilize out-of-state products to some degree. The mere fact that out-of-state goods are somewhere utilized in the business transactions of either party does not, standing alone, support federal jurisdiction. *John Kalin Funeral Home, Inc. v. Fultz,* 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd per curiam* 442 F.2d 1342 (9th Cir. 1971), *cert. denied* 404 U.S. 881 (1971); *Sun Valley Disposal Co. v. Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969).

It is true that this circuit has looked to the out-of-state purchases of goods to support jurisdiction under the affecting-commerce test in *Gough v. Rossmoor Corporation,* 437 F.2d 373 (9th Cir. 1973), and *Rasmussen v. American Dairy Association,* 472 F.2d 517 (9th Cir. 1972). However, both of these cases involved situations where the alleged anti-competitive practices were aimed at totally eliminating a competitive product from the market. *Rossmoor* involved the elimination of a competing carpet dealer while *Rasmussen* discussed a conspiracy aimed at completely destroying the market for "GO", a liquid milk drink. In both of these cases, the plaintiffs were able to establish that the elimination of their businesses, and their product lines, would necessarily result in a significant decrease in interstate purchases of the supplies or ingredients utilized in producing their goods. Plaintiffs

in the instant action have failed to show that their elimination as Union dealers in any way substantially affected the continued interstate purchase of supplies by Union.

Finally, plaintiffs contend that Union's interstate use of its wholesale pricing scheme necessarily had a substantial effect on interstate commence and that a challenge to such an interstate plan is properly reviewed by the federal courts. Plaintiffs seek to bring themselves under the jurisdictional protection of *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964), and *Lehrman v. Gulf Oil Corporation,* 464 F.2d 26 (5th Cir. 1972), *cert. denied* 409 U.S. 1077 (1972). However, I find that neither of these opinions is specifically applicable to the fact situation presently before the Court.

In *Simpson* the Supreme Court made it clear that even a single local dealer could challenge an inherently coercive price-fixing scheme. In *Lehrman* Judge Wisdom, writing for the court, expanded on the *Simpson* doctrine holding that a widely utilized pricing plan, even if benign on its face, could be reviewed by the federal courts if the plan was allegedly coercively applied against even a single local plaintiff. In both *Simpson* and *Lehrman* the coercion used by the defendants was inherent in the interstate pricing plan. In *Simpson* a purchase consignment agreement by its terms required the dealers to sell at a specified price. In *Lehrman,* Gulf utilized a wholesale pricing system with built-in price supports, admittedly analogous to the system used by Union in its Western Region. In retaliation for Lehrman's price-cutting activities, Gulf withdrew his price supports. The coercive leverage of removing the price supports from wayward dealers was inherent in the pricing system since all wholesalers depended on the availability of price assistance. Although Gulf had only applied the coercive withdrawal technique to a single plaintiff, the Fifth Circuit properly feared that the oil company need only make an example of a few dealers to insure that their other wholesalers

would keep their prices in line with company dictates. The local application of coercive leverage inherent in the pricing plan, therefore, had a pervasive and substantial effect on many dealers involved in interstate commerce.

In the case at bar, however, the element of coercive leverage inherent in the pricing policy is missing. Unlike the situation in *Simpson,* Union's wholesale pricing policy is not coercive on its face. Dealers are instructed that they are free to set their own retail prices. Indeed, a virtually identical pricing program which was concededly administered in a noncoercive fashion was recently sustained by the First Circuit in *Butera v. Sun Oil Company, Inc.,* 496 F.2d 434 (1st Cir. 1974).

Nor was the coercive withholding of the promised benefits of a sign rental allowance and a jobbership inherent in the Union pricing plan. Plaintiffs were promised these future benefits because of their unique position as large volume dealers. Indeed, the possibility of a jobbership was such an unusual business opportunity that plaintiffs were induced to begin dealing with Union rather than just continue their past dealing practices with several other major gasoline suppliers. Plaintiffs do not seriously assert that the promised discount and jobbership were somehow part of the wholesale pricing system or were promised to dealers on a wide-scale basis.

In contrast to the situation in *Lehrman,* Union did not attempt to regulate plaintiffs' prices by a threatened or actual attempt to withdraw price supports. Until plaintiffs were terminated, they were able to participate in the price support program despite their refusal to follow Union's pricing instructions. At most, the undisputed facts establish that when plaintiffs exercised their independent pricing discretion, Union attempted to keep them in line by coercive techniques independent of its widespread pricing program. An isolated, atypical application of coercion upon dealers who are purchasing gasoline under an inherently benign pricing

system would not have set a threatening example to other wholesalers who had never been promised the business benefits withheld in the first place. The coercion applied to plaintiffs had no more of an effect on the gasoline industry than the regulation of the prices charged by plaintiffs in their local operations.

Nor do I find particularly persuasive on this jurisdictional question two cases decided in this district and cited by plaintiffs. In *Hamamciyan v. Mobil Oil Corp.,* 1973-2 Trade Cases ¶ 74,722 (N.D. Cal. 1973), Judge Conti relied on *Simpson v. Union Oil Co., supra,* and *Lehrman v. Gulf Oil Corporation, supra,* to sustain federal jurisdiction in a dealer termination case. However, it appears that the court in *Hamamciyan* was reviewing a potentially widespread anti-competitive withdrawal of price supports, not as here, an isolated and atypical use of a coercive lever against dealers who also happened to purchase their gasoline under a uniform pricing system. In *Westphalen v. Mobil Oil Corp.,* 1973-1 Trade Cases ¶ 74,423 (N.D. Cal. 1972), Judge Peckham denied a defendant's motion for summary judgment in an antitrust dealer termination case because there were material issues of fact in dispute. In that case, the court was not even addressing the jurisdictional question.

The question of jurisdiction being a factual issue that must be determined on a case-by-case basis (*Lehrman v. Gulf Oil Corporation, supra*), I find that a review of the facts, conceded and undisputed for this motion, fails to support federal jurisdiction under either the "in-the-flow of" or the "substantial-effect-on" commerce theories. It may be that the conduct of Union herein alleged, if proven, may rise to the dignity of a violation of California's anti-trust law, the Cartwright Act (Cal.Bus.&Prof. Code § 16700 *et seq.*), but, interstate commerce being absent, this Court has no jurisdiction under the Sherman Act. Accordingly, defendant's motion for summary judgment is granted.

Plaintiffs' complaint having been dismissed for lack of federal jurisdiction, defendant's pendent state counterclaims for breach of contract, and conversion, lacking an independent jurisdictional basis, must also be dismissed. 3 Moore, *Federal Practices* ¶ 13.15[1] at 382 (2d ed. 1974); *Manufacturers Cas. Ins. Co. v. Arapahoe Drilling Co.*, 267 F.2d 5 (10th Cir. 1959); *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965). Accordingly, defendant's counterclaims are dismissed for lack of jurisdiction.

IT IS HEREBY ORDERED that on or before February 5, 1976, defendant shall lodge with the Court a form of judgment approved as to form by the plaintiffs.

Dated: January 22, 1976.

WILLIAM H. ORRICK, JR.
United States District Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

Filed Jun 1 1978
Emil E. Melfi, Jr., Clerk, U.S. Court of Apeals

Canadian American Oil Company, et al.,
Plaintiffs-Appellants,

v.

Union Oil Company of California,
Defendant-Appellee.

No. 76-1672

ORDER

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and JAMESON, District Judge.

The petition for rehearing is DENIED.

Supreme Court, U. S.
FILED
SEP 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-350

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

VS.

CANADIAN AMERICAN OIL COMPANY, and
FREDERICK M. TAUTENHAHN, partners,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Petitioner has utilized for the statement of facts the opinion of the United States Court of Appeals for the Ninth Circuit. Union Oil Company neglects to mention the following factual statement in the opinion (Appendix A therein, p. 3):

> "Union representatives contacted appellants and urged them to keep their prices within two cents of the pre-

vailing market price. Appellants, however, persisted in their price-cutting practices. Union countered the refusal of appellants to raise their prices by denying appellants' request for the promised sign rental discount and for the jobbership."

It is further noted that Union has failed to fully disclose the details of its storage and purchase program. Under this program Union keeps possession of the gasoline by obtaining free storage rights at the service station and adjusts the prices to the dealer based on Union's determination of the prevailing retail prices. It reserves the right to deliver gasoline at its discretion. (Cr. 1424, Supp. Vol.)

Union attempts to make the sign rental allowance and jobbership unique and unusual. In fact, it was shown by the respondents that resellers who owned or otherwise held control of the real property were allowed by Union Oil Company a meeting competition allowance or a sign rental allowance of between one and one-half to two cents per gallon. Such non-lessee stations are classified by Union as digit number 0095. Third digit 9 reflects "other retail outlet" and fourth digit 5 reflects "non-lessee dealer" (Pl. Ex. 64, 65; Cr. 339-340). Respondents attempted to pass on their expected sign rental allowance to the consumer against Union's warnings not to do so. Termination of relations followed. That Union Oil Company offered additional discounts to jobbers in the ordinary course of business is not seriously in dispute (Id.).

Dispute exists as to Union's characterization of its storage and purchase program as not involving price communications to the dealer. When Union changed its prior

determination of prevailing retail it informed the dealer of the resale price and the wholesale price (Id., Cr. 1424-1425). Authorization of such a price change may be made only by Union's Western Regional officers. The dealer's purchase price and the adjustment prices are determined by the Vice President of Marketing for the Western Region and are established without regard to state boundaries. They are changed interstate at the same time. (Appendix A, pp. 4-5).

The refinery supplying gasolines to respondents, the Oleum Refinery, is an interstate facility that supplies Oregon, Washington and Hawaii with gasolines (Appendix A, p. 5).

I. The Decision Below Is Clearly Correct

A. Interstate petroleum marketers may not fix the resale prices of its dealers.

1. This Court has consistently held that Congress may and did reach fully integrated interstate corporations in the Sherman Act in their relations with dealers when per se restraints are involved.

The court below correctly held that the Union's Storage and Purchase Program was interstate and that Union's relations with plaintiffs substantially affected the interstate program. There clearly can be no distinction between the opinion of the court below and this Court in *Simpson v. Union Oil Company*, 377 U.S. 13 (1964). Present counsel there supported the opinion of the Ninth Circuit, 311 F.2d 764, by urging, in part, that Simpson had failed to demon-

strate the requisite interstate commerce or effect thereon (Respondent's Brief, Supreme Court of the United States, October Term, 1963, No. 87, pp. 102-103). This Court in *Simpson* found no interstate commerce issue, noting the interstate character of Union's business and the extensive use of the same form as involved with Simpson in the Western States. Thus the two cases are virtually indistinguishable. Termination of relations with price deviants were utilized in both cases to support a vast interstate pricing network. It is the character of the restraint and not a quantitative effect on interstate commerce that is decisive in these cases. *United States v. Socony Oil Vacuum Company,* 310 U.S. 150, 224, footnote 59 (1940).

B. Interstate marketers of petroleum products create a flow of interstate commerce.

1. The flow of interstate commerce doctrine allows the courts to look at the interstate commerce issue as one involving the practical movement of goods and services and disallows isolation of any particular segment of interstate commerce from the whole.

Clearly this Court's opinion in *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231 (1951) requires the courts to view interstate marketing in its entirety, and makes it an error for the District Court to have isolated any particular part of Union Oil's interstate commerce from any other part. See also *United States v. Employing Latherers Ass'n.,* 347 U.S. 198 (1954). *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186 (1974) involved a subsidiary who did not intend to nor did it engage in commerce among the several states.

The interstate commerce issue is basically one of the power of the federal Congress. Congress intended to and clearly has reached the ability of Union Oil to fix resale prices. The elimination of companies such as respondents from its marketing system in order to control their retail prices can only result in the application of the private damage provisions of the Clayton Act.

It is respectfully urged that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, September 14, 1978.

MAXWELL KEITH,
DAVID J. FRIEDENBERG,

By MAXWELL KEITH,
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Supreme Court, U. S.
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Respondents.

Petitioner's Reply Brief

On Petition for a Writ of Certiorari
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Petitioner's Reply Brief

Respondents' brief in opposition emphasizes why the petition should be granted by sharpening the question presented.

The supposed proposition of law which respondents submit as sustaining the decision below can be summed up so:

> In a case of conduct of a kind which would be a *per se* violation of the Sherman Act *if* the requisite element of interstate commerce were satisfied, that element is satisfied by the mere fact that the party whose conduct is assailed engages in interstate commerce, although the conduct neither is in interstate commerce nor affects interstate commerce but is an isolated, atypical event, local, unique, and not characteristic of the party's general mode of operation.

The district court stated (App. to Pet., p. 19) that jurisdiction is a factual issue "that must be determined on a case-by-case basis" and that "a review of the facts, conceded and undisputed for this motion, fails to support federal jurisdiction under either the 'in-the-flow of' or the 'substantial-effect-on' commerce theories." The Court of Appeals did not differ on the facts; it went off on the view that, *as a matter of law,* if only the company is a large

company "engaged in interstate commerce", withholding of any benefit from any dealer because he ignores pricing instructions is in or affects interstate commerce no matter how unique that benefit may be.*

Respondents' opposition states the proposition in all its starkness. In *Noble v. McClatchy Newspapers,* 533 F. 2d 1081 (9 Cir. 1975) the very court below held that it was error to refuse an instruction to the jury reading that if a restraint of trade is of a type which is unreasonable *per se,* it is "unnecessary for plaintiff to prove that there has been a restraint of interstate trade and commerce as a result of such restriction—it is presumed." This Court granted certiorari in that case, *McClatchy Newspapers, et al. v. Noble, et al.,* 433 U.S. 904 (1977), upon a petition in which one of the three questions presented read thus:

> "Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did."

However, the Court's order granting the petition simultaneously reversed the judgment of the court below and remanded the case for further consideration in the light of the decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Because the court below then directed judgment for the petitioner McClatchy Newspapers, Inc., on the basis of the *Sylvania* decision, the question quoted above was mooted there.

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*Respondents refer to Union's method of selling gasoline as interstate and as a "storage and purchase program", a term not found in either opinion below. That method has been held to be legal, in former litigation conducted by respondents' counsel, *Peters v. Union Oil Company,* 328 F. Supp. 998 (C.D. Cal. 1974), and it is *not* the conduct which either court below thought would violate the Sherman Act if the element of interstate commerce were present. The supposed illegalizing fact here was something else, *viz.,* refusal to sell to a particular dealer. It is to be added that while, solely for the purposes of its motion, Union "conceded many facts" (opinion of district court), it has not conceded that those facts would constitute a violation of the Sherman Act, *per se* or otherwise, were the element of interstate commerce present.

It now returns, as respondent presents the issue. It has long been elementary that the Sherman Act is not implicated unless two elements conjoin:

(1) There is a restraint of trade which is unreasonable either because (a) it is unreasonable in fact or (b) it is deemed unreasonable *per se,* and

(2) the restraint is either in or has a substantial adverse effect on interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186 (1974); *United States v. American Building Maintenance Industries,* 422 U.S. 271 (1975); *Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738 (1976).

The rule of the court below in the *McClatchy* case assigned to a *per se* situation a double office, the first, to assign unreasonableness to the restraint, the second, to usurp the requirement of commerce. That is not the law as applied by this Court. As recently as *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), a *per se* price-fixing case, the Court stated the issues, as follows (421 U.S. at 780):

> "Our inquiry can be divided into four steps: did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce?"

Perhaps respondent adds another element to the proposition *viz.,* that the accused party is one that engages in interstate commerce. But this makes the identity of the accused party, rather than the nature of the conduct as being in or affecting interstate commerce, the test of whether the Sherman Act applies.

CONCLUSION

We respectfully submit that the proposition is wrong, and that the petition should be granted to allow no entry for it into Sherman Act jurisprudence.

Dated, San Francisco, California, September 27, 1978.

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